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IN THE

Supreme Court of the United States

October Term, 1972
No. 71-651

STATE OF CALIFORNIA,

Petitioner,

vs.

JUDITH H. KRIVDA and RODGER T. MINOR,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR REHEARING

EVELLE J. YOUNGER,
Attorney General of the State of California,

EDWARD A. HINZ, JR.,
Chief Assistant Attorney General—Criminal Division,

WILLIAM E. JAMES,
Assistant Attorney General—Appeals Section,

S. CLARK MOORE,
Assistant Attorney General,

RUSSELL IUNGERICH,
WILLIAM R. POUNDERS,
Deputy Attorneys General,
600 State Building,
Los Angeles, Calif. 90012,
(213) 620-2782,

Attorneys for Petitioner



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PETITION FOR REHEARING

The petitioner herein respectfully petitions this Court for a rehearing of the above entitled cause, and urges the following grounds for rehearing:

Article I, Section 19 of the California Constitution Was Not an Independent or Adequate State Law Ground Capable of Supporting the Decision of the California Supreme Court

In the *per curiam* decision rendered in this case on October 24, 1972, this Court stated ". . . we are unable to determine whether the California Supreme Court based its holding upon the Fourth and Fourteenth Amendments to the Constitution of the United States or upon the equivalent provision of the California Con-

stitution, or both." For this reason, the judgment of the Supreme Court of California was vacated and the cause was remanded to that Court for appropriate further proceedings.

A careful reexamination of article I, section 19 of the California Constitution as interpreted by the California Supreme Court should lead this Court to conclude that that section was not a possible non-federal ground for the lower court's decision. No California case has ever held that article I, section 19 contains or requires an exclusionary rule analogous to the exclusionary rule held to be required by the Fourth and Fourteenth Amendments to the United States Constitution. The landmark decision of *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955), expressly rejected any constitutional basis for the rule that it proclaimed. In *Cahan*, Mr. Justice Traynor wrote for the Court:

> ". . . It bears emphasis that in the absence of a holding by the United States Supreme Court that the due process clause requires exclusion of constitutionally obtained evidence, whatever rule we adopt, whether it excludes or admits the evidence, will be a judicially declared rule of evidence." (44 Cal. 2d at 442, 282 P.2d at 910.)

In so holding, the California Supreme Court eschewed any and all reliance upon article I, section 19 of the California Constitution as a possible basis for the exclusionary rule in California. Since *Cahan*, no California case has held that the search and seizure clause of article I, section 19 to require a state exclusionary rule analogous to the federal rule made applicable to the States in *Mapp v. Ohio*, 367 U.S. 643 (1960). Indeed, the California Supreme Court recently

declined to consider the question of whether California's vicarious exclusionary rule was required by article I, section 19 of the California Constitution. *Kaplan v. Superior Court*, 6 Cal. 3d 150, 161 n. 9, 98 Cal. Rptr. 649, 656, 491 P.2d 1, 8 (1971). When the California Supreme Court declined to attribute a state constitutional basis even to this local rule of standing, its action unmistakably indicated a reaffirmation of the choice made in *Cahan* not to predicate the exclusionary rule upon the state constitution.

It its *per curiam* opinion, this Court was troubled by the language of *People v. Edwards*, 71 Cal. 2d 1096, 80 Cal. Rptr. 633, 458 P.2d 713 (1969), wherein the California Supreme Court stated:

> ". . . Accordingly, that search was unlawful under the Fourth Amendment of the federal Constitution. It similarly violated article I, section 19, of the California Constitution. . . ." *Id.* at 1105, 80 Cal. Rptr. at 638, 458 P.2d at 718.

The statement that the search "violated" the state constitution cannot be interpreted as indicating that the exclusion of evidence was compelled to remedy the violation of that provision. Numerous California cases prior to *People v. Cahan, supra*, stated that various unreasonable searches violated article I, section 19 of the California Constitution, but nevertheless held that no exclusionary rule was compelled by the state search and seizure clause. *People v. Kelley*, 22 Cal. 2d 169, 172, 137 P.2d 1, 3 (1943); *People v. Gonzalez*, 20 Cal. 2d 165, 168-69, 124 P.2d 44, 46-47, *cert. denied*, 317 U.S. 657 (1942); *People v. Mayen*, 188 Cal. 237, 241-253, 205 Pac. 435, 436-441 (1922); *People v. Le Doux*, 155 Cal. 535, 546-48, 102 Pac. 517.

521-22 (1909). Hence the mere statement in *People v. Edwards, supra,* that police conduct violated the search and seizure clause of the California Constitution does not indicate that article I, section 19 was an independent and adequate state law basis for the California Supreme Court's decision upholding the exclusion of evidence in the instant case.

Since California neither before nor since the *Cahan* decision has found an exclusionary rule to be required by article I, section 19 of the California Constitution, there can really be no ambiguity as to the basis of the California Supreme Court's decision. When *Mapp v. Ohio,* 367 U.S. 643 (1960) held that the Fourth Amendment exclusionary rule was enforceable against the states through the Fourteenth Amendment, California ceased to have any separate or independent rule in this area. It must be emphasized that *Cahan* enunciated a judicially declared rule of evidence having no basis whatsoever in the California Constitution. *Mapp v. Ohio* subsumed *Cahan* within the broader requirements of the Fourteenth Amendment. Since *Mapp,* the California Supreme Court has never considered the question of whether the exclusionary rule is also compelled by the California Constitution. In the absence of a holding that the exclusionary rule is so compelled as a matter of state law, one can only conclude that the decision of the court below rested upon federal constitutional provisions alone.

To remand this case to the California Supreme Court at this juncture would simply afford the court below an opportunity to decide a question of first impression and to insulate its decision from review in this forum. Thus, this Court's present decision departs from

the general rule that this Court has jurisdiction to review a case where, as here, the state might have based its decision on a non-federal ground but did not in fact do so. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98 (1938); *Int'l. Steel Co. v. Nat'l. Surety Co.*, 297 U.S. 657, 666 (1936); *Grayson v. Harris*, 267 U.S. 352, 358 (1925). *See also Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 375-76 (1968).

Conclusion

For these reasons, petitioner urges that a rehearing be granted and that this Court reverse the judgment of the California Supreme Court.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California,

EDWARD A. HINZ, JR.,
Chief Assistant Attorney General —Criminal Division,

WILLIAM F. JAMES,
Assistant Attorney General— Appeals Section,

S. CLARK MOORE,
Assistant Attorney General,

RUSSELL IUNGERICH,
WILLIAM R. POUNDERS,
Deputy Attorneys General,

Attorneys for Petitioner.

END OF CASE